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Supreme Court of the United States

October Term, 1956

No. 857 [redacted].

LOUIS B. SAPERSTEIN,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANK S. HOGAN
District Attorney
New York County

RICHARD G. DENZER
ALBERT P. LOENING, JR.
Assistant District Attorneys
Of Counsel

207 BAR PRESS, INC., 84 LAFAYETTE STREET, NEW YORK 13, N. Y. — WA 5-2488

INDEX

	PAGE
STATEMENT	1
INTRODUCTION	2
ARGUMENT	6
The petition raises no substantial question warranting review by this Court	6
(a) Concerning sections 501 and 605 of the Federal Communications Act	6
(b) Concerning the use of a special jury	10
(c) Concerning the manner in which the proceedings were instituted	14
CONCLUSION	15

PAGE

Cases Cited

Equitable Life Assurance Society v. Brown (1902) 187 U. S. 308 14

Fay v. New York (1947) 332 U. S. 261 ..... 10, 14
Flournoy v. Weiner (1944) 321 U. S. 253 14

Moore v. New York (1948) 333 U. S. 565 ..... 10, 14

People v. Breslin (1954) 306 N. Y. 294 3
People v. Saperstein (1957) 2 N. Y. (2d) 210 ..... 1, 7
People v. Saperstein (1st Dept. 1956) 1 App. Div. (2d) 402, 949 ..... 1, 2

Schwartz v. Texas (1952) 344 U. S. 199 ..... 7, 10
Spies v. Illinois (1887) 123 U. S. 131 14
Stemmer v. New York (1949) 336 U. S. 963, 337 U. S. 921 7

Twining v. New Jersey (1908) 211 U. S. 78 9

United States v. Polakoff (CCA 2d 1940) 112 Fed. (2d) 888, cert. den. 311 U. S. 653 ..... 9, 10

Vanderwyde v. Denno (1954) 347 U. S. 949, 971 12
Vanderwyde v. New York (1953) 345 U. S. 959, 1004 .. 12

Statutes

	PAGE
Constitution of the United States Art. VI, clause 2	6
Constitution of the United States, 14th Amendment, clause 1	5, 6, 9
United States Code, Title 28, section 1257	14
United States Code, Title 47, sections 501, 605	5, 6, 7, 8
New Jersey Statutes Annotated 2A: 81-18 et seq.	3
New York Code of Criminal Procedure, section 618-a	3
New York Code of Criminal Procedure, section 813-a	6, 7
New York Judiciary Law, section 749-aa	10
New York Penal Law, section 376-a	13
New York Penal Law, section 600	2
New York Penal Law, section 2447	3

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Statement

This is a petition for a writ of certiorari to the Court of Appeals of the State of New York, to review an order of that court, entered January 10, 1957, unanimously affirming, with opinion per DESMOND, J. (2 N. Y. 2d 210; see Appendix to Petition, p. 1a*), an order of the Appellate Division, First Department, of the Supreme Court of the State of New York (1 App. Div. 2d 402, see 3724-31**)

* Hereinafter referred to as "appendix".

** References, unless otherwise indicated, are to folios of the printed record on appeal to the New York Court of Appeals.

entered April 24, 1956, unanimously affirming a judgment of the Court of General Sessions, New York County, rendered July 30, 1954, which convicted the petitioner of five crimes of CONTEMPT OF COURT (N. Y. Penal Law, §600), after a trial before MULLEN, J. and a special jury. The petitioner was sentenced to five consecutive terms of one year each in the New York City Penitentiary (109, 3675-7).

On January 23, 1956, the Court of General Sessions (MULLEN, J.) suspended execution of all but the first term of the sentence (see appendix, p. 93-a). This action of the trial court was vacated by the Appellate Division, First Department, in a separate order entered April 24, 1956, which noted that it had been taken in the absence of the petitioner and his attorney (1 App. Div. 2d 949, see 3723), and remitted the matter to the Court of General Sessions for resentencing or other appropriate proceedings (3718-21).

No further action has been taken by the Court of General Sessions pursuant to the above order, and the petitioner is presently at liberty on bail.

Introduction

From November 24, 1953, up to the time of the petitioner's trial, an investigation was being conducted before the fourth grand jury impaneled in the Court of General Sessions, New York County, for the November term, 1953. This investigation sought to determine whether insurance agents had conspired with labor union officials and others

to split commissions received on life, health and accident insurance, placed on behalf of union members, in violation of the Insurance Law and Penal Law of New York (344-5).

In particular, during the course of the investigation, the grand jury sought to ascertain if the petitioner, an insurance agent in Newark, New Jersey, had so conspired and whether, as part of the conspiracy, one George Scalise had been instrumental in getting business for him; whether Scalise had thereby benefited financially and had an interest in the petitioner's business; and whether he had instructed, ordered or directed the petitioner in the conduct of his business (345-8).

The petitioner was called as a witness before the above grand jury, pursuant to the reciprocal witness statute (N. Y. Code Crim. Proc. §618-a; N. J. Stat. Ann. 2A: 81-18 et seq.). On May 9, 1954, the second of the petitioner's five appearances before the grand jury, he was granted full state immunity [1524-6; see N. Y. Penal Law, §2447; *People* v. *Breslin* (1954) 306 N. Y. 294].

At his appearances therefore on March 2 and 9, 1954, he testified among other things, that he was friendly with Scalise, but that Scalise had never helped him get union insurance business and had no interest in his insurance agencies or corporations, of which the petitioner had several; and that he had never discussed any union account with Scalise so far as he could recall (1082-5, 1090-4, 1262-6, 1545-6, 1551-3, 1559-60, 1564, 1619-20).

At the petitioner's appearance on March 11 and 15, 1954, certain recordings, purportedly of intercepted telephone

conversations between the petitioner and Scalise in 1952, were played back to him and he was asked if he had participated in them. Five of these conversations, the ones underlying the five counts in the indictment, purported to reveal the petitioner discussing with a person addressed as "George" the acquisition of labor union insurance business and the details of negotiation with respect thereto, in language clearly exhibiting a community of interest between them and, in fact, frequently including directions or orders given by "George" to the petitioner. These conversations are summarized in the indictment, and were played back at the trial, as indicated in the following table:

Date of Conversation	*No.*	*Folios in Indictment*	*Folios of Playback*
Nov. 7, 1952	3	60-3	2294-304
Nov. 7, 1952	2	43-6	2337-46
Nov. 8, 1952	4	76-7	2417-22
Nov. 14, 1952	1	25-30	2054-100
Nov. 17, 1952	5	90-2	2254-9

The petitioner repeatedly refused to answer, either surely or with reservation, whether he had participated in these conversations. He claimed a total lack of recollection, which, he said, was not restored either by the fact that, in some instances, the voices sounded like his and Scalise's (2120-6, 2130, 2133-5, 2139, 2145, 2154-5, 2260-2, 2265-7, 2309, 2315, 2327, 2456) or that parts of some of the conversations sounded familiar (2123-6, 2130-3, 2136-8, 2148-51, 2154-66, 2270-8, 2307-9, 2313, 2368, 2370, 2381-5,

2387, 2432-8). The petitioner's evasion and claim of amnesia were found to be contumacious, and no contention is now made to the contrary (see petition, p. 4).

On May 13, 1954, the petitioner was indicted by the above grand jury for Contempt of Court (13-96).

A motion for a special jury was granted by the Court of General Sessions (MULLEN, J.) on May 26, 1954 (106-7; see appendix, pp. 55a-59a). The trial commenced on June 21, 1954 and concluded with a verdict of guilty on July 2, 1954 (121-3, 3579-88).

The evidence at the trial, besides the transcript of the petitioner's testimony before the grand jury, consisted of the testimony of the grand jury foreman, secretary and stenographers, and of a deputy clerk of the court, showing the legality of the grand jury investigation, the propriety of its proceedings, and the relevancy of the examination of the petitioner.

The petitioner offered no defense, resting on his case at the conclusion of the People's evidence (3023, 3117).

The petitioner now contends (petition, pp. 8-17, 18-22), as he did in the state courts, that the Fourteenth Amendment precluded requiring him to testify about the recorded telephone conversations; that the state wiretapping laws are invalid because they conflict with the Federal Communications Act (Title 47, U. S. Code, §§501, 605), and because they violate the Fourteenth Amendment; and, finally, that the trial before a special jury denied him due process and equal protection of the laws.

ARGUMENT

The petition raises no substantial question warranting review by this Court.

(a) Concerning sections 501 and 605 of the Federal Communications Act

Of the four questions presented in the petition (pp. 2-3), all but the last are part of a long and tenuous argument through which the petitioner seeks to invoke the Federal Communications Act against the instant conviction.

Because section 605 of the Act prohibits the interception and divulgence of communications without authorization by the sender, and violation thereof is made a crime by section 501, the petitioner concludes that these sections: (a) conflict with, and therefore, under the Supremacy Clause, preclude New York's provisions for wire tapping by court order (petition, pp. 14-15), (b) grant a party to an intercepted telephonic conversation a "privilege", within the Privileges and Immunities Clause, not to have such conversation disclosed, in any manner whatsoever, which the New York wire tapping provisions would violate (*id.*, pp. 16-17), (c) require the petitioner—under penal sanction—to refuse to give the evidence sought herein by the grand jury, because in so doing he would be divulging intercepted communications (*id.*, pp. 8-9, 11-12, 14); and, therefore, (d) render unconstitutional any attempt by New York to compel such testimony (*id.*, pp. 12-14).

From this summary of the petitioner's contentions, it is apparent that his argument is premised upon a novel interpretation of the scope and effect of these provisions

of the Federal Communications Act, heretofore unsupported by court decision.

In the first place, this Court has already held that no conflict exists between the aforementioned section 605 and section 813-a of the New York Code of Criminal Procedure, authorizing wire tapping by court order [*Stemmer* v. *New York* (1949) 336 U. S. 963, reh. den. 337 U. S. 921], since Congress did not intend, by the enactment of section 605, to preclude the exercise of the states' police power in this field [*Schwartz* v. *Texas* (1952) 344 U. S. 199, 202-203].

Secondly, it is apparent that the question of the validity of New York's wire tapping laws is only remotely related to issues in the instant case, involving a refusal to testify before a grand jury. As the court below observed (2 N. Y. 2d 210, 216; appendix, p. 5a):

> "• • • the only wire tapping question we have before us here is as to whether this defendant had any valid excuse for refusing to give testimony identifying the voices in recordings of wire taps made by other persons, of conversations in which the defendant took part."

The petitioner seeks to justify his conduct before the grand jury by asserting that, if he had given the testimony requested, he would have become "a party to and an instrument in the divulgence by the state officers of the intercepted communications", thereby violating section 605 of the Communications Act, and exposing himself to a prosecution under section 501 thereof (petition, pp. 9, 11-12, 13-14).

This extreme proposition is not supported by the decisions cited by the petitioner (petition, pp. 8, 12, 17-18), most of which involve the unrelated question of the use of wire tap evidence at a criminal trial in a Federal court.

Moreover, the proposition depends upon a stretching of the rules of vicarious criminal liability far beyond their usual application. In this regard, it must be remembered that the petitioner's appearance before the grand jury was not voluntary, but under compulsion of subpoena, and the telephone conversations concerning which he was questioned had been intercepted and recorded by police officers without either his knowledge or consent. Furthermore, the recordings of these conversations had, in each instance, already been played back to the grand jury *verbatim* before the petitioner was questioned in regard thereto. The sole purpose of questioning the petitioner was to obtain definite confirmation of what the grand jury undoubtedly had surmised from listening to the recordings, namely, that the conversations were between the petitioner and George Scalise and related to the latter's efforts to use the petitioner as a conduit for getting money out of union welfare funds into his own pockets.

Under the circumstances, it is far-fetched to claim that the petitioner's act of answering these grand jury questions would have constituted a prohibited "interception" or "divulgence", punishable under the Federal Communications Act. As the petitioner admits (petition, p. 12):

> "Unquestionably, a witness may testify as to his own independent recollection of a telephone conver-

sation or as to what he overheard by means other than interception * * *"

New York's action in seeking to compel such testimony, upon a grant of immunity, would manifestly not deny the petitioner "the fundamental justice and fairness implicit in the Due Process Clause" (*id.*, p. 14).

In another facet of his argument, the petitioner asserts (petition, pp. 16-17) that he was privileged, as a party to an intercepted telephone conversation, to refrain from testifying in regard thereto, and that this privilege was protected by the Privileges and Immunities Clause of the Fourteenth Amendment.

This contention is apparently based upon an excerpt taken out of context from *United States* v. *Polakoff* (C. C. A. 2d, 1940) 112 Fed. (2d) 888, 889, cert. den. 311 U. S. 653, which presents that court's view that each party to a telephone conversation has an independent right—there referred to as a privilege—not to have the conversation intercepted. Neither that case nor any other known to us supports the petitioner's contention that, as a party to a telephone conversation, he acquired any privilege—still less, one protected by the Fourteenth Amendment [see *Twining* v. *New Jersey* (1908) 211 U. S. 78, 97-99]—not to testify about it because it had been intercepted.

Moreover, implicit in the defendant's theory that he was privileged not to reveal the contents of an intercepted telephone conversation in which he participated, is recognition that he would not be so privileged as to an unintercepted one. Yet, no reason is apparent or suggested for

such a distinction. Even if sought to be predicated on some supposition that wiretaps should not be used, as in this case, as a lever for extracting testimony about one's conversation, the attempted distinction would still fail. If an individual has no privilege against the use of wiretaps of his conversations to send him to prison (*Schwartz* v. *Texas, supra*), *a fortiori,* he has no privilege against their being used to elicit his testimony as a witness.

In the *Polakoff* case, *supra,* the court held that, for wiretap evidence to be admissible in a Federal court, both parties to the communication must have consented to the interception. Because this ruling conflicts with decisions of some of the other United States Courts of Appeals (see cases cited in petition, p. 18), the petitioner advances this as an additional reason for granting certiorari (petition, pp. 17-18).

However, since none of these decisions is at all in point with the instant case, it need only be observed that this is not a proper occasion for this Court to resolve the above conflict.

(b) Concerning the use of a special jury

The petitioner urges his trial by a special jury as a basis for the granting of certiorari (petition, pp. 18-22).

Although the constitutionality of New York's special jury statute (N. Y. Judiciary Law, §749-aa) has been upheld by this Court [*Fay* v. *New York* (1947) 332 U. S. 261; *Moore* v. *New York* (1948) 333 U. S. 565], the petitioner seeks to distinguish these decisions by virtue of a showing,

in the instant case, that the District Attorney's Office of New York County had compiled records containing information about members of the special jury panel for trial use in the selection of juries (petition, pp. 18-19).

The pertinent facts are set forth below.

The special panel comprises about 2000 jurors, drawn from a general panel of about 60,000 (see appendix, p. 73a). While the record herein does not disclose precisely how many of these jurors are subjects of comment in the district attorney's files, the fact that there were 55 folders with respect to the 150 jurors drawn for this case (2622) might be taken as a rough indication that the proportion is about one third.

The folders (Peo. Exh. 13 for ident.; 2639) contained information on the jurors from the observations of trial assistants, from newspaper articles, and, in many cases, from reports prepared by investigators of the District Attorney's Office—none of which reports was more recent than 1947, this practice having been discontinued. This information, occasionally accompanied by terse comments, related to the individual juror's background, including such matters as marital status, financial condition, sobriety, reputation, and intelligence, his past jury service, and his prejudices, eccentricities, and the like.

There were also cards on some of these jurors in the files of the Homicide Bureau (2623-4). The information on these cards, compiled by trial assistants, consisted solely of a record of the particular individual's prior jury service and brief comments by the assistant as to his fitness as a juror (see 2916-22).

Some two weeks prior to the trial, upon motion of the petitioner and with the full acquiescence of the People, the court ordered that all of the district attorney's information concerning the jury panel be made available to the defense (see 2621-33, petition, p. 20). This was done, and there is no claim that any item of information in the prosecution's possession was not open to inspection by the petitioner (2627, 2633-4, 2640-2, 2925-6).

Parenthetically, it should be noted that the material contained in the appendix on the individual jurors (pp. 74a-91a) is not an exact transcript of, but apparently a collation of information derived from, the aforementioned cards and folders. The folders themselves, and photostatic copies of the cards, were submitted to the New York Court of Appeals on the argument of the appeal below, and are available should this Court desire to see them.

The petitioner's contention—urging unconstitutionality of the special panel because of the information compiled by the district attorney—is essentially the same argument that was repeatedly made before this Court in the *Vanderwyde* cases [*Vanderwyde* v. *New York* (1953) 345 U. S. 959, 1004 (cert. petition, pp. 9-10, 14-15; reh. petition, pp. 6-8); *Vanderwyde* v. *Denno* (1954) 347 U. S. 949, 971 (cert. petition, pp. 19-21, reh. petition, p. 5)].

Insofar as this argument concerns due process, it is not, basically, an attack upon the special jury system as such. Rather, it amounts to a contention that any jury panel is unfair to the point of unconstitutionality if the local prosecuting authorities have obtained information concerning a substantial percentage of the jurors.

In short, this reasoning is just as applicable to a similarly investigated general panel of 2000 jurors outside New York City as to the special panel of 2000 here in issue. In counties with small jury panels, the obtaining of such information would probably be easier, and the coverage more complete, than in New York City. Indeed, in rural communties, the prosecutor is doubtless personally acquainted with most of the jurors.

Assuming that the possession of such information would confer an advantage on the prosecution, such advantage was not present in the case at bar. Every scrap of information concerning the talesmen who had been investigated was as available to the defense as it was to the People. Thus, the prosecution, needing the unanimous votes of the twelve jurors to be selected, had no more information about the trial panel than the petitioner, who needed the vote of only one juror to prevent a conviction.

To maintain his claim of a denial of equal protection in the instant case, the petitioner is forced to contend vehemently that, in spite of the possession of all of the prosecution's information on the jurors, he was still at a disadvantage. This argument (petition, pp. 19-21), which was never advanced in the trial court, is based almost entirely upon speculation and hyperbole.

It need only be observed, in this regard, that there is not a shred of evidence in the record that the jurors—who, of course, would never be contacted personally (see N. Y. Penal Law §376-a, petition, pp. 30-31)—were investigated prior to the trial or were aware they had been investigated in the past. Nor is there evidence that the petitioner was

in the least manner dissatisfied with, or uncertain about, the information furnished him as to any particular juror (see 2621-47, 2912-28).

Under the circumstances, there is no showing of unconstitutionality in the instant case such as to warrant any deviation from the rulings in the *Fay* and *Moore* cases, *supra*.

(c) Concerning the manner in which the proceedings were instituted

We agree with the petitioner that he might possibly have raised all the questions here presented by appeal rather than certiorari [Title 28, U. S. Code, §1257; see *Flournoy* v. *Weiner* (1944) 321 U. S. 253, 263 (petition, p. 22)].

We cannot agree, however, with the petitioner's assertion (petition, p. 22) that this fact in any way adds to the merit of the instant petition, on the theory that this Court would have had to assume jurisdiction had the proceedings been instituted by appeal. If the decision of the State court on the Federal questions presented for review by appeal is clearly in line with prior decisions of this Court, —as we believe is the case as to both the wire tapping and special jury aspects of the petition—the petitioner would have no "right" that the appeal be entertained [see *Spies* v. *Illinois* (1887) 123 U. S. 131, 164; see, also, *Equitable Life Assurance Society* v. *Brown* (1902) 187 U. S. 308, 314-315].

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

FRANK S. HOGAN
District Attorney
New York County

RICHARD G. DENZER
ALBERT P. LOENING, JR.
Assistant District Attorneys
Of Counsel

April, 1957